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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 829

A. L. DUTTON, Warden, Georgia State Prison,
Reidsville, Georgia,
Appellant,

vs.

ALEX S. EVANS,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF APPELLEE

We have previously filed a Motion to Affirm the judgment below. For the reasons stated therein, we urge the Court to grant the motion, pursuant to Rule 16 of this Court, and affirm the judgment from which this appeal is prosecuted.

It is noted that in its supporting brief, Appellant has presented nothing new, but has reiterated its argument contained in the Jurisdictional Statement previously filed. Accordingly, our argument here will be substantially the same as was urged in our Motion to Affirm.

To place in context the decision of which Appellant complains, Appellee was on trial for the offense of murder. He was jointly indicted with Williams, who had already been tried and sentenced to death, and with one Truitt. The latter furnished the only substantial evidence against Appellee. His testimony was given under the terms of a written agreement with the State, under which he was guaranteed immunity from prosecution for the triple murder of three police officers and other rewards.

The witness Shaw was permitted to testify that a few weeks before the trial, Williams, who, like Shaw, was at the time a federal prisoner, had been taken to Gwinnett County, Georgia, for arraignment. After Williams was returned to the federal penitentiary, Shaw inquired of him as to how he had made out at the arraignment. Williams replied, "If it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now." Counsel for Appellee timely objected to this testimony, before and after its admission into evidence, invoking among other objections the federal constitutional right to confrontation (Appendix 49-51, 55). Proper and timely objection having been made to such evidence, the Court of Appeals correctly held that this particular hearsay evidence denied Appellee his Sixth Amendment right to confrontation.

Patently, the statement attributed by Shaw to Williams was an accusation by Williams that Appellee was responsible for the three murders, that he was guilty of the offense for which he was on trial. In effect, this was

a "confession" by a co-defendant that Appellee was a participant in the murders and was guilty. Under no concept could it be contended that the extra judicial, ex parte statement of Williams was in furtherance of an alleged conspiracy to commit murder. We do not understand Appellant to urge that it was.

In making its ruling, the Court of Appeals held that, under the facts of this case, Georgia Code Section 38-306, as construed by the Supreme Court of Georgia and applied in this case, is repugnant to the Sixth Amendment. That code section provides:

> "After the fact of conspiracy shall be proved, the declarations of any one of the conspirators during the pendency of the criminal project shall be admissible against all."

ARGUMENT AND CITATION OF AUTHORITIES

While Appellant has presented its argument under the form of four questions presented, in reality only two questions present themselves. The first is whether Appellee was denied constitutional confrontation. The second is whether the denial of such confrontation was harmful to Appellee. We will consider these issues in the order presented.

I.

Confrontation

There can no longer be any question but that an accused in a criminal case, save in exceptional circumstances, is entitled to be confronted by his accusers and to exercise his right of cross-examination. *Pointer* v. *Texas*, 380 U.S. 400; *Douglas* v. *Alabama*, 380 U.S. 415; *Brookhart* v. *Janis*, 384 U.S. 1; *Bruton* v. *United States*, 391 U.S. 123; *Roberts*

v. *Russell*, 392 U.S. 293; *Flores* v. *United States*, 5 Cir., 379 F.2d 905; *United States* v. *Lyon*, 7 Cir., 397 F.2d 505, 510; and *Serio* v. *United States*, DC Cir., 401 F.2d 989. The cited authorities and those decided under their teaching advise that these rights are inalienable and that they may be neither eroded nor emasculated by indirection or subtlety.

The Georgia statute in question, Georgia Code Section 38-306, as construed by the Supreme Court of Georgia and applied in this case, has the effect of infringing these rights. It would probably serve no useful purpose here to give a detailed discussion of the history and development of the criminal conspiracy law of Georgia, but perhaps it would be enlightening to refer to some of its characteristics as it existed at the time of the trial. There was no general "conspiracy" statute at that time. A conspiracy could be proved, though not alleged in the indictment. *Dixon* v. *State*, 116 Ga. 186(8), 42 S.E. 357; *Whitaker* v. *State*, 159 Ga. 787(5), 127 S.E. 106. The common-law crime of conspiracy did not exist in Georgia. In effect, proof of a conspiracy was in reality a rule of evidence and a means of proving the accomplishment of the criminal act. *Bishop* v. *State*, 118 Ga. 799(4), 45 S.E. 614; *Nobles* v. *State*, 98 Ga. 73, 26 S.E. 64.

In this situation, the statutory provision in question developed from decisional law and was later codified. As previously stated, it provides that, "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." It is to be noted that in context there is no requirement that such declaration be in *furtherance* of the conspiracy.

Another statute, Georgia Code Section 38-414, provides:

> "The confession of one joint offender or conspirator, made after the enterprise is ended, shall be admissible only against himself."

However, the latter rule is unavailing, as the Supreme Court of Georgia has consistently held, as it did in Appellee's case, *Evans* v. *State*, 222 Ga. 392, 402, 150 S.E.2d 240, that a conspiracy, by its nature, includes as a part thereof an agreement to conceal the fact that a crime has been committed and the identity of the perpetrators of the offense. *Chatterton* v. *State*, 221 Ga. 424(5), 144 S.E.2d 726. Thus, under the statutory law, as applied by the Supreme Court of Georgia, incidentally, contrary to *Grunenwald* v. *United States*, 353 U.S. 391, until the conspirators are tried and convicted, the conspiracy is deemed to continue and any declaration of one conspirator is admissible against the other, regardless of whether such declaration is in furtherance of the conspiracy or not. *Evans* v. *State*, supra. For example, under the rulings of the Supreme Court of Georgia, which it followed in the present case, in *Darden* v. *State*, 172 Ga. 590, 158 S.E. 414, a confession made by a co-defendant not on trial, implicating the defendant on trial, although not made in his presence, was nevertheless held admissible against him. The court, after quoting the applicable code section, stated:

> "Under the evidence in the case the jury was authorized to find that there was a conspiracy entered into by the three defendants, who were jointly indicted, to kill (the deceased), and the statements admitted into evidence were declarations of one of the conspirators during the pendency of the criminal project."

Parenthetically, we note that under this rule, on the trial of one of two persons jointly indicted, the declarations of the other that he alone committed the offense with which they are charged are not admissible in evidence in favor of

the accused on trial. *Robison* v. *State*, 114 Ga. 445, 40 S.E. 253; *Parks* v. *State*, 24 Ga. App. 243, 100 S.E. 724.

It is observed that in earlier cases the Supreme Court of Georgia construed the statute differently, in that it held that declarations of a co-conspirator, to be admissible against one on trial, must not only have been made during the pendency of the conspiracy, but also must have been made *in furtherance of its object*. *Wall* v. *State*, 153 Ga. 309, 112 S.E. 142 (1922). This rule has long since been abandoned, although it is consistent with the federal rule followed ever since *Logan* v. *United States*, 144 U.S. 263, 309.[1] There can be no contention and none has been made by Appellant that the statement attributed to Williams, the co-defendant not on trial, was in any remote way in furtherance of the conspiracy contended for by the State. As the Court of Appeals observed in footnote 22 of its opinion, quoting from *Fiswick* v. *United States*, 329 U.S. 211, 217, a "confession or admission of one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it."

In his brief, at pages 21-22, Appellant concedes that in order for a declaration, such as that with which we are concerned, to be constitutionally admissible under the facts of this case, "It must relate to the conspiracy or acts done in furtherance of the conspiracy." This statement is then followed by the citation of and quotation from the opinion of a District Court *civil* case. This isolated lower Court opinion in a civil case could hardly be said to support any logical contention that the Williams' declaration was, or

1. "Doubtless in all cases of conspiracy the act of one conspirator *in the prosecution of the enterprise* is considered the act of all, and is evidence against all. *United States* v. *Gooding*, 25 U.S. 12, 12 Wheat. 400, 409. But only those acts and declarations are admissible under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object." (Emphasis supplied).

could be held to be, an utterance in furtherance of the conspiracy here involved. This is particularly true in view of *Logan* v. *United States*, supra; *Pinkerton* v. *United States*, 328 U.S. 640, 646; *Fiswick* v. *United States*, supra; *Brown* v. *United States*, 150 U.S. 93. See cases cited and discussion in *Gambino* v. *United States*, 3 Cir., 108 F.2d 140.

Appellant has devoted a great portion of his argument to the proposition that involved here is nothing more than a deviation or ramification of the "hearsay rule". While the argument and suggestions flowing so freely therefrom to some extent tend to obfuscate the real and decisive issue, a denial of confrontation is none the less so because it is the result of hearsay evidence. This Court, in the cases cited hereinbefore, i.e., *Pointer*, *Douglas*, *Brookhart*, *Bruton* and *Roberts*, has decided this issue. The present appeal presents nothing novel nor suggestive that those decisions of this Court should be reviewed or overruled. On the basis of them, the judgment of the Court of Appeals should be affirmed.

In *Pointer* v. *Texas*, 380 U.S. 400, there was introduced into evidence a transcript of a witness' testimony given at a preliminary hearing, at which the defendant was not represented by counsel and did not avail himself of the right to cross-examine the witness. The witness had subsequently moved out of the state with no intention to return. This Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the Fourteenth Amendment. It held further, that under the facts of the case, the use of the transcript constituted a denial of the defendant's constitutional right of confrontation. At the same time, this Court decided *Douglas* v. *Alabama*, 380 U.S. 415. In that case, as here, an accomplice

had been found guilty in a previous separate trial. When called as a witness in defendant's trial, he invoked his privilege against self-incrimination. Thereupon, the prosecuting attorney produced a confession signed by the accomplice and, in the guise of cross-examination to refresh the witness' recollection, read from the document. The accomplice continued his refusal to testify, although he was asked periodically by the prosecuting attorney whether he made the statement which was being read in the presence of the jury. Thereafter, law enforcement officers who identified the document as the accomplice's confession, were called as witnesses. The document itself was not offered into evidence. This Court again held that the confrontation clause of the Sixth Amendment is applicable to the states. It further held that the facts stated above constituted a denial of such right.

While the *Pointer* case is not in direct point with the case under review, it does establish that the accused's right to confront witnesses against him is a fundamental right, essential to a fair trial and that this right is obligatory on the states. It further establishes that the right to confrontation will be enforced against the states, according to the same standards that protect this right against federal encroachment. A major reason underlying the constitutional confrontation rule is to give the defendant in a criminal case an opportunity to cross-examine the witnesses against him. In reaching this decision, this Court recognized that there are certain exceptions based primarily upon necessity. In recognition of these exceptions, it cited *Mattox* v. *United States*, 146 U.S. 140; *Mattox* v. *United States*, 156 U.S. 237; and *Dowell* v. *United States*, 221 U.S. 325, upon which Appellant so strongly relies. This Court found no inconsistency between those cases and its ruling in the *Pointer* case. There is none.

In *Douglas* v. *Alabama*, supra, the facts are not, in effect, dissimilar from those presented here for review. We submit that in that case the vice found by this Court did not necessarily involve the fact that the prosecuting attorney had in his possession a written document which was identified as a statement given by the accomplice. As a matter of fact, the written document was not introduced into evidence. The true vice was the denial of confrontation afforded by the procedure there used which permitted the prosecuting attorney to recite an extra judicial, ex parte statement made by the accomplice. In that case, as here, the statement which was recited by the prosecuting attorney was accusatory in nature and named the defendant on trial as the person who actually fired the blast which wounded the victim. We think it of no significance that it was the prosecuting attorney who recited the statement of the accomplice; the result would have been the same had one of the officers been permitted to recite the statement, or, for that matter, had a fellow prisoner of the accomplice been permitted to testify with regard to it.

In *Brookhart* v. *Janis*, 384 U.S. 1, this Court held that the introduction as evidence against a defendant of an alleged confession, made out of Court by one of his co-defendants, who did not testify in Court, denied the defendant an opportunity "*to confront and cross-examine the witness who made this very damaging statement.*" (Emphasis supplied). The Reporter does not indicate whether the alleged confession was physically admitted into evidence as a document or whether it was merely recited by the officer or other person who secured it from the co-defendant. Apparently, this detail was deemed insignificant by this Court, as we assume it to be. Surely, the form of the testimony, whether oral or in physical form, is unimportant. In either form, the defendant is denied the

right of confrontation. What is significant is that the defendant was denied confrontation and that concomitant right to cross-examination of *the witness who made the statement*. The same is true in the present case. While Shaw was permitted to testify and was subjected to cross-examination, Appellee was denied confrontation by the witness who made the accusatory and incriminating statement against him.

As we have stated, it is immaterial whether the improperly admitted evidence is or ever has been in the form of a written instrument. In its brief, Appellant seeks to attach some importance to the fact that the statement attributed to Williams "does not involve hearsay consisting of written testimony taken outside the courtroom." In neither *Bruton* v. *United States*, 391 U.S. 123, nor *Roberts* v. *Russell*, 392 U.S. 293, were written transcripts or written testimony involved. In both of these cases, the illegally admitted testimony related to oral statements made by a co-defendant. In the former case, the two defendants were tried jointly. An oral confession made by one of the defendants was admitted under instructions of the court that the jury could consider it only with regard to the defendant who made it. On review of the conviction of Bruton, this Court held that the admission of the co-defendant's oral confession involving Bruton was a denial of Bruton's Sixth Amendment right to cross-examination and that this encroachment upon his constitutional rights could not be avoided by a jury instruction to disregard the confession as to Bruton. The same result was reached with regard to the State Court trial in *Roberts* v. *Russell*, supra. In that case, the co-defendant had given an oral confession to an officer, admitting that he and Roberts had committed the crime. In neither of these cases was it significant that a police officer testified as to the extra judicial statement of the co-defendant, nor that the state-

ment made by the co-defendant was oral, rather than written. In both cases, the officer testifying to the oral statement was present in Court, as was Shaw in the present case, and was subject to cross-examination.

In the final analysis, it appears that it is immaterial in what manner and by what guise a defendant is denied his Sixth Amendment right to confrontation and to cross-examination. In the case under review, Appellee was, as held by the Court of Appeals, denied his right of confrontation under the facts of the case. The ruling of the Court of Appeals was correct. It should be affirmed.

II.

Was the Error Harmless?

There is no need to speculate as to whether the error was harmful. The right granted to an accused by the Sixth Amendment to confront witnesses against him includes the right of cross-examination and is made obligatory upon the states by the Fourteenth Amendment, under the authorities hereinbefore cited. *Where there has been a denial of such right, prejudice to the accused is presumed. Brookhart* v. *Janis,* supra. As observed by this Court in *Bruton* v. *United States,* an important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence. In view of these recent decisions, it would appear to be unnecessary to say more on the subject; however, it is not amiss to make other supporting observations.

Before a federal constitutional error can be held harmless, "the Court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18. A review of the record in this case, despite Appellant's assertion to the contrary, will disclose that the conviction is based almost solely upon the

uncorroborated testimony of an accomplice who had been granted *total immunity* from prosecution in three capital offenses confessed to by him, plus assistance in securing his parole release from federal authorities on an unrelated charge. Such corroboration as is shown by the evidence relates to time, place and event, not toward connecting Appellee with the offense.

In this situation, over most strenuous objection by Appellee,[2] the State insisted that the testimony of Shaw was admissible. This arose under circumstances where the testimony was anticipated, as Williams had already been tried. Thus, at the time the constitutional question was raised, Shaw, who had been brought to court for the express purpose of giving this testimony, had not already testified. The constitutional objection having been raised, had the State at that time considered the evidence "far less than the proverbial drop in the bucket," and nonharmful and nonprejudicial to Appellee, as it now contends, surely it would have withdrawn the witness.

The testimony of Shaw, in effect, constituted an accusation by Williams, who did not confront Appellee, that Appellee was guilty of the murders. It was certainly the intention of the State that it be so construed and understood. From the manner in which it was presented, there can be no other construction. In no event can it be said that the evidence was harmless beyond a reasonable doubt.

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2. In footnote 3, page 10 of his brief, Appellant states that the objection related only to the scope of Shaw's testimony, that is, "Shaw's being allowed to testify as to his audio as well as his visual perception". We fail to grasp the connotation; however, only the conversation was at issue. Other than to say that he saw and talked to Williams, Shaw offered no testimony as to his visual perception. The objection (T. 142-144; Appendix 49), included: ". . . and to permit this witness to testify as to what somebody else told him would be in substance to permit the testimony of another witness . . . to testify through this man's lips and to deny the defendant the right of confrontation guaranteed by . . . the Constitution of the United States, Sixth Amendment. . . ."

Williams' accusation and incrimination of Appellee added substantial, perhaps even critical, weight to the State's case in a form not subject to cross-examination. The harm done Appellee cannot be estimated. As in *Douglas* v. *Alabama,* supra, it is apparent from the record before this Court that the alleged statement of Williams clearly bore on a fundamental part of the State's case against the petitioner. The record will not and does not support the assertion now urged by Appellant that the testimony of the witness Shaw was "mildly implicating" or "entirely corroborative". The effect of the prejudicial error cannot be treated so objectively.

We could write more at length, but feel that what we have said, together with the astute and well reasoned opinion of the Court of Appeals, appearing in the record and at pages 28-38 of the Appendix, suffice to refute and dispose of all of the arguments interposed by Appellant.

CONCLUSION

This Court has "followed the 'undeviating rule' . . . that the rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial." *Parker* v. *Gladden,* 385 U.S. 363. The judgment below is consistent with, indeed, demanded by, this Court's prior decisions in this regard. It should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, of Counsel for Appellee, does hereby certify that he has this date served upon Counsel for Appellant a copy of the within and foregoing Brief of Appellee by mailing the same, properly stamped, United States mail, addressed: Attorney General, State of Georgia, Attention Alfred L. Evans, Jr., Esquire, 132 State Judicial Building, 40 Capitol Square, Atlanta, Georgia 30334.

This 16th day of May, 1969.

.....

ROBERT B. THOMPSON